IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1118 of 1992

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHWINBHAI C SHETH

Versus

BANK OF BARODA

Appearance:

MR SHAILESH PARIKH for MR HB SHAH for Petitioner

MR UDAY R BHATT for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 09/03/2001

ORAL JUDGEMENT

1. This is a revision under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (the Bombay Rent Act for short) at the instance of the original plaintiff-landlord, who sued the respondent defendant-tenant for a decree of eviction under the

provisions of the Bombay Rent Act.

2. The landlord sued for a decree of eviction on two grounds. The first ground was that the landlord required the premises reasonably and bonafide for his own requirements. Secondly, the eviction was sought on the ground of non-user of the rented premises by the tenant for a continuous period of six months immediately prior to the date of the suit i.e. under section 13(1)(k) of the Bombay Rent Act.

3. The trial court, after appreciating the evidence on record, dismissed the suit of the landlord on the ground of reasonable and bonafide requirement, but found on the facts and evidence on record that the landlord had established non-user of the rented premises on the part of the tenant for a continuous period of six months immediately prior to the suit, and therefore passed a decree under section 13(1)(k) of the Bombay Rent Act.

4. The tenant being aggrieved by the said decree of eviction preferred an appeal under section 29(1) of the Bombay Rent Act. It is pertinent to note that the landlord had not filed any cross appeal nor did he file cross objections in the appeal filed by the tenant so far as the finding of reasonable and bonafide requirement was rendered against him.

5. The lower appellate court, after reappreciating the evidence on record, allowed the appeal filed by the tenant, firstly by holding that the landlord had failed to establish by appropriate evidence on record the non-user of the rented premises on the part of the tenant for a continuous period of six months prior to the suit, and also found that even if such non-user were established, the tenant had proved that there was reasonable cause for such non-user during the relevant period. On these findings the lower appellate court allowed the appeal of the tenant and dismissed the suit of the landlord for decree of eviction.

6. It is under these circumstances that the landlord has preferred the present revision application under section 29(2) of the Bombay Rent Act.

7. Learned counsel for the petitioner-landlord has made strenuous efforts to convince me that the appreciation of the evidence on the part of the appellate court is erroneous and/or grossly unjust, and that the same cannot be sustained or upheld. I am, however, unable to accept the views canvassed by the learned

counsel for the landlord.

8. Before proceeding with the merits of the matter it would be pertinent to bear in mind the principles laid down by the Supreme Court while dealing with the revisions arising under section 29(2) of the said Act. The Supreme Court in the case of Patel Valmik Himatlal & Others Vs. Patel Mohanlal Muljibhai [1998(2) GLH 736 = AIR 1998 SC 3325], while approving and reiterating the principles laid down in its earlier decision in the case of Helper Girdharbhai Vs. Saiyad Mohmad Mirasaheb Kadri [AIR 1987 SC 1782], held that High Court cannot function as a court of appeal, cannot reappreciate the evidence on record, cannot discard concurrent findings of fact based on evidence recorded by the courts below, and cannot interfere on grounds of inadequacy or insufficiency of evidence, and cannot interfere, except in cases where conclusions drawn by the courts below are on the basis of no evidence at all, or are perverse. A different interpretation on facts is also not possible merely because another view on the same set of facts may just be possible.

9. Even otherwise I find on an independent appreciation of the facts on record which are beyond controversy, that the lower appellate court has clearly not applied its mind to such facts in the light of section 13(1)(k) of the Bombay Rent Act.

10. There cannot be any controversy that section 13(1)(k) casts the burden of proof on the landlord to establish by appropriate evidence on record that the rented premises were not used by the tenant for the purpose for which they were let for a continuous period of six months immediately prior to the suit.

10.1 Section 13(1)(k) reads as under:

> 13.(1) Notwitstanding anything contained in this Act [but subject to the provisions of section 15], a landlord shall be entitled to recover possession of any premises if the Court is satisfied:-
>
> *** *** ***
>
> (k) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit; or"

11. In the context of this provision, it is desirable to retain focus on two aspects of the matter viz. (i) that such period of non-user must be a continuous period of six months and (ii) that this period of six months must be immediately prior to the date of the suit. It is, therefore, necessary to identify this specific period from the facts of the case. The suit notice at Exh.44 is dated 10th December 1985. The suit was filed on 25th April 1986. Therefore, the landlord is required to prove by appropriate evidence that the period of non-user on the part of the tenant was a period beginning from 25th October 1985 to 25th April 1986. This period shall hereinafter be referred to as "the relevant period".

12. When we examine the averments made in the plaint, we find that the averments therein are only general in nature. The plaint merely avers that the tenant does not use the property and kept it vacant "from 1982 till today". Obviously if this averment is proved strictly by evidence on record, it would establish the case of the landlord so far as the first requirement of section 13(1)(k) is concerned. However, when the landlord stepped into the witness box as the plaintiff (Exh.48), his deposition altered the averments made in the plaint substantially. The plaintiff specifically deposed, as part of his examination-in-chief, that the tenant had kept the property "vacant and under non-use" from 1982 to 1985. It is pertinent to note that this positive assertion only covers part of the relevant period as discussed hereinabove, and the case as put up by the plaintiff in his own deposition and particularly in examination-in-chief does not cover any part of the year 1986. In short, therefore, the plaintiff does not even assert, even in his examination-in-chief, that the property was kept by the tenant in non-use for the entire relevant period. It is further required to be noted that there was no cross-examination of the landlord on this aspect of the matter. The cross-examination concerns itself with other items of controversy, and the tenant attempted to establish the actual periods when the property was put into use (by allotment to its employees/ officers.)

13. As against this the defendant-tenant has examined its officer Ishwarbhai Dalwadi who was an allottee as an employee of the defendant bank at Exh.54. Suffice it to say that this witness clearly establishes that he had occupied the rented premises as an allottee of the defendant bank firstly in the year 1983 and then in the year 1986. No doubt, this witness does not identify the

specific period of occupancy of the rented premises in the year 1986. At the same time the plaintiff-landlord has also failed to cross-examine this witness of the defendant to bring out and/or to clarify as to what was the specific period of occupancy in the course of the year 1986.

14. The net result of this state of the evidence on record is that the plaintiff himself does not assert non-user in respect of any part of the year 1986, whereas the defendant's witness Ishwarbhai Dalwadi establishes occupancy of the rented premises for at least part of the year 1986. In this fact situation it cannot possibly be said that the landlord has proved non-user for the entire relevant period.

15. Since the landlord has failed to establish the first requirement of section 13(1)(k), the tenant is not required to justify or to show reasonable cause for such non-user for the relevant period.

16. In the premises aforesaid, on the state of the evidence on record, no decree for eviction could possibly be granted in favour of the landlord. The judgement and decree of the lower appellate court is, therefore, required to be sustained.

17. This revision is, therefore, without any substance and the same is accordingly rejected. Rule is discharged with no order as to costs.

*****

ar